



CORPORATION COUNSEL

Carrie K.S. Okinaga, Corporation Counsel

Kathleen A. Kelly, First Deputy Corporation Counsel

POWERS, DUTIES AND FUNCTIONS

The Corporation Counsel serves as the chief legal advisor and legal representative of all agencies, the City Council and all officers and employees in matters relating to their official powers and duties, and shall represent the City in all legal proceedings and shall perform all other services incident to the office as may be required by the Charter or by law.

ORGANIZATION OF DEPARTMENT

The Department of the Corporation Counsel is organized into the Administration Division and three other divisions, namely:

1. Counseling and Drafting
2. Real Property Tax
3. Litigation

COUNSELING AND DRAFTING DIVISION

The Counseling and Drafting Division is comprised of 28 attorneys: a division head and 27 Deputies Corporation Counsel. The division is supported by 12 support staff, including three paralegal assistants and seven legal clerks. The division performs the function of legal advisor to all the City agencies, the City boards and commissions, and the City Council and its Committees. In this advisory function, the division is responsible for rendering oral and written opinions to all of the entities it advises, for drafting bills and resolutions for submission to the City Council or the State legislature, for reviewing and approving legal documents to which the City is a signatory, and for attending all the meetings of the City Council, the Council Committees, and the City boards and commissions.

The division performs the legal representation function, representing City agencies in City and State administrative proceedings. The division also performs the legal representation function in selected court proceedings such as eminent domain proceedings, quiet title, partitions of land court property, administrative appeals, foreclosures, bankruptcy, interpleader actions for the return of seized property and other matters as may be specially assigned.

Statistics

For the fiscal year July 2009 to June 2010, the division commenced the year with 1,813 outstanding opinion requests, thereafter it received 1,334 requests, completed and closed 1,003 requests, and had a workload of 3,147 requests during the year. The division closed the year with a total of 2,144 outstanding requests. Separate and apart from the foregoing count of opinion requests, the division issued one Memorandum of Law, which responded to one opinion request received during the year.

The division commenced the year with 47 outstanding drafting requests i.e., requests to draft bills, resolutions, leases, easements, contracts, affidavits, etc., thereafter received 271 requests, completed and closed 252 requests, and had a workload of 318 requests during the year. The division closed the year with a total of 66 outstanding requests.

The division commenced the year with 669 outstanding requests for review and approval of legal documents, thereafter received 5,328 requests, completed and closed 5,333 requests, and had a workload of 5,997 requests during the year. The division closed the year with a total of 664 outstanding requests.

The division commenced the year with 353 outstanding pre-suit cases i.e., adversarial proceedings pending before administrative bodies, thereafter received 65 requests, completed and closed 147 requests, and had a workload of 418 cases during the year. The division closed the year with a total of 271 outstanding requests. The division commenced the year with 524 outstanding case assignments i.e., cases in any of the state or federal courts, thereafter received 179 requests, completed and closed 209 requests, and had a workload of 703 cases during the year. The division closed the year with a total of 494 outstanding requests.

FINANCE SECTION

Furlough Friday. The division's Infrastructure and Finance Sections assisted the Department of Parks and Recreation and the Purchasing division of the Department of Budget and Fiscal Services with preparation of contracts to provide children with supervised play and recreation activities during those days when the Hawaii public schools were closed due to teacher furloughs. (Geoffrey M. Kam, Dawn D. M. Spurlin)

Stoneridge Towing Protests. The division assisted the Purchasing division of the Department of Budget and Fiscal Services with an appeal of a procurement protest to the Intermediate Court of Appeals ("ICA"). In 2002, the City issued Solicitation No. 13878 for a five-year contract to provide towing services in Zones III-IV-V (Urban Honolulu). Stoneridge Towing filed and litigated various protests related to Solicitation No. 13878. Eventually, Stoneridge protested the cancellation of Solicitation No. 13878 to the State Department of Commerce and Consumer Affairs (PCH-2003-5) and requested that it be awarded the five-year contract. The City obtained a favorable decision of PCH-2003-5 at the DCCA level.

Stoneridge then appealed the DCCA decision to the Circuit Court in Stoneridge v. City and County of Honolulu, Civil No. 07-1-0469-03. The Circuit Court decided for the City on the ground of mootness. The Circuit Court adopted the City's argument and found that Stoneridge, by virtue of having the temporary contracts for Zones III-IV-V for over five years, for \$7,000 per month less than it had bid, had basically had the benefit of the five-year towing contract. Stoneridge then appealed the Circuit Court's decision to the ICA. The ICA, in Stoneridge v. City and County of Honolulu, et al., No. 29228, found for the City on all grounds and affirmed the Circuit Court's decision. Stoneridge then applied for a writ of certiorari from the Hawaii Supreme Court.

The Supreme Court rejected Stoneridge's application, thereby terminating the case.

The division also assisted the Purchasing division with stipulated dismissals of two related Stoneridge protests, PCH-2005-7 (protest of Solicitation No. 14591) and PCH-2004-3 (protest of award of temporary towing contracts).

With the Supreme Court's decision, all Stoneridge protests were concluded. (Amy R. Kondo, Geoffrey M. Kam)

HSAC Annual Conference. The division assisted the Council with the negotiation and preparation of a Memorandum of Understanding for event planning services for the Hawaii State Association of Counties annual conference. The division also assisted the Council with preparing the Exhibitors' Application and Agreement for the Conference's vendor exhibition, "Exhibit 2010." (Geoffrey M. Kam)

Harvey Brothers Protest of Mililani Wastewater Preliminary Treatment Facility Headworks ("WWPTF") Upgrade Contract. The division assisted the Department of Environmental Services and the Purchasing division of the Department of Budget and Fiscal Services in responding to a protest of Mililani WWPTF Upgrade Contract. (Amy R. Kondo, Geoffrey M. Kam)

Hawaii Five-0. The division assisted the Honolulu Police Department and the Honolulu Film Office with negotiating an agreement regarding the use of prop vehicles for the CBS Television production of Hawaii Five-0. (Geoffrey M. Kam)

Honolulu Zoo Parking Concession. The division assisted in providing the preliminary legal analysis and subsequent issuance of the concession solicitation for the parking lot at the Honolulu Zoo. The contract was awarded to Aparc Systems, Inc., who installed ten pay stations at the Honolulu Zoo parking lot under the contract. Customers may use coins or a credit card to pay for their parking and may also make further payments by using their cell phone if sufficient payment was not made at the pay station. (Nicole R. Chapman)

Takeover Agreement with Travelers Casualty and Surety Company of America. The division assisted the Department of Design and Construction in terminating the right of the awarded contractor, Nilasoni Landscape, Inc. ("Nilasoni"), to complete performance on three contracts due to Nilasoni's default and abandonment of jobs. The three contracts were for the reconstruction of concrete sidewalks at various sites on Oahu. The division then assisted in negotiating and entering into a takeover agreement with the surety company who had bonded the three contracts, Traveler's Casualty and Surety Company of America. The remaining work for the projects was completed by the surety under the takeover agreement. (Nicole R. Chapman)

INFRASTRUCTURE/COMMUNITY SERVICES SECTION

Wastewater Consent Decree. The division assisted the Departments of Environmental Services and Design and Construction in arriving at a proposed global wastewater consent decree with the United States Department of Justice, the United States Environmental Protection Agency, the State of Hawaii Department of Health, the State of Hawaii Department of the Attorney General, the Sierra Club, Hawaii Chapter, Our Children's' Earth Foundation, and Hawaii's Thousand Friends. The proposed consent decree covers the City's wastewater collection system and the Sand Island and Honouliuli wastewater treatment plants. It addresses the City's compliance with the federal Clean Water Act, state law, and permits under the National Pollutant Discharge Elimination System program, and will resolve three federal court cases. The proposed consent decree has been lodged with the federal court, where it will be subject to a 30-day public comment period. It will be effective when it is entered by the court. (Carrie K.S. Okinaga, Kathleen A. Kelly)

Waimanalo Gulch Sanitary Landfill. The division assisted the Department of Environmental Services ("ENV") in its December 3, 2008 application for a special use permit ("SUP") for the remaining capacity of the Waimanalo Gulch Sanitary Landfill ("WGSL"), consistent with the City Council's selection in December 2004 of WGSL as the location of the future municipal solid waste landfill.

The Planning Commission granted intervenor status to three parties in the permit application proceedings and denied intervention to Councilmember Todd K. Apo. After a contested case hearing, the City Planning Commission recommended approval of the requested SUP with conditions on July 31, 2009, and the State of Hawaii Land Use Commission issued its certified order approving the recommendation of the Planning Commission, with modifications, on October 22, 2009. The division provided legal representation to ENV throughout the proceedings before the Planning Commission and the LUC.

Related to the SUP are four judicial matters: (1) Councilmember Apo filed an agency appeal (Civil No. 09-1-1394-06 (RAN)) contesting the Planning Commission's denial of his application for intervention. On July 21, 2010, the court denied that appeal; (2) Colleen Hanabusa filed a complaint (Civil No. 08-1-2562-12 (RAT)), challenging the environmental impact statement ("EIS") for the SUP. On March 16, 2010, the court granted ENV's motion for summary judgment, ruling that Hanabusa did not have standing to bring the lawsuit, and even if she did, the EIS in question met all legal requirements; (3) Hanabusa and others (Civil No. 09-1-2714-11 (RAN)) sought to overturn the LUC decision and have the SUP denied. The court denied this appeal on August 8, 2010; (4) In Civil No. 09-1-2719-11 (RAN), ENV asked the court to strike Condition 14 of the LUC order, imposing a deadline on the acceptance of municipal solid waste at WGSL, as well as Conditions 15 and 16 of the Order, relating to certain reporting requirements imposed upon the City Council. On August 3, 2010, the court denied ENV's request to strike Condition 14, and modified Conditions 15 and 16 by requiring ENV to comply with these conditions instead of the City Council and City Administration. The division provided legal representation to ENV throughout these court proceedings, and will continue to do so in any further appeals. (Gary Y. Takeuchi, Jesse K. Souki, Sharon Lam Blanchard)

Interim Off-Island Shipment of Municipal Solid Waste. In 2008, the City issued an Invitation for Bids for the interim shipment of municipal solid waste from Hawaii to the mainland United States, for landfill disposal on the mainland. When the bid of the apparent low bidder, Hawaiian Waste Systems LLC (“HWS”), was deemed unresponsive, HWS filed a procurement protest. A contested case hearing was held before a Hearings Officer of the State of Hawaii Department of Commerce and Consumer Affairs on July 28-31, 2009. The parties eventually agreed to settle the matter, and on August 26, 2009, a Settlement and Order was entered, resolving the protest and allowing HWS to be awarded the contract, with an amendment. HWS then began performance pursuant to the contract, but was unable to ship any waste to the mainland United States, and eventually asked the City to stop delivering waste to their facility for processing. Since that time, HWS and the City have been involved in settlement discussions to resolve the matter. The division, through the Infrastructure/Community Services Section and the Finance Section, provided legal representation to ENV and the Department of Budget and Fiscal Services throughout these matters, and will continue to do so. (Gary Y. Takeuchi, Sharon Lam Blanchard, Dana M. Viola; Amy R. Kondo, Ryan H. Ota)

Round Top Drive. The division assisted the Department of Facility Maintenance (“DFM”) in negotiating terms of an intergovernmental agreement (the “Agreement”) between DFM and the State Department of Land and Natural Resources (the “State”) whereby the City would maintain dispersion channel structures to be constructed by the State on Round Top Drive. The State offered to construct the improvements if the City would maintain them. The construction improvements were to improve drainage by spreading out runoff water over a large area to minimize the impact of flow from drainage outlets on the State premises. The City Council, by Resolution No. 10-61, authorized the execution of the Agreement on March 17, 2010, and DFM and the State completed execution of the Agreement on May 3, 2010. (Jennifer D. Waihee)

Adjudication of Liquor Commission matters. The division worked with the Liquor Administrator to develop and implement new procedures for the adjudication (and pre-adjudication) of liquor law and rule violations, thereby improving case assessment and prioritization, streamlining the hearings process, and providing increased education and accessibility for licensees. In doing so, the typical time span between the date of any given violation and the date of adjudication was reduced from 8-12 months, to 2-3 months. (Tricia M. Nakamatsu)

Support to Department of Facility Maintenance Regarding Maili’ili Channel. The division assisted the Department of Facility Maintenance (“DFM”) in providing responses to requests for information in connection with investigations by multiple regulatory agencies, including the Army Corps of Engineers, the United States Environmental Protection Agency and the State of Hawaii Department of Health, regarding Maili’ili Channel. These investigations centered on reuse of City sidewalk slabs to stabilize the banks of an unlined stretch of the otherwise mostly concrete-lined Maili’ili Channel. This use allowed heavy equipment to clear heavy vegetation in the middle of the Channel, thereby reducing the potential of flooding during 100-year storm events. The division also provided support to DFM in all aspects of its response to an EPA administrative order to create an acceptable removal and restoration plan (which restoration plan has since been approved by all appropriate agencies). Finally, the division assisted DFM in contesting, as inappropriate, a State of Hawaii Department of Health notice of violation and proposed penalty of \$1,735,000 in the matter. The division will be providing continuing assistance in 2010, as the matter moves towards resolution. (Jennifer D. Waihee, Daniel W. S. Lawrence)

Assistance to Honolulu Police Commission in Selecting a New Police Chief. The division provided guidance to the Honolulu Police Commission on procurement issues, employment law issues, Charter issues and Sunshine Law issues that arose in the course of the Commission’s months-long process of selecting a new Chief. (Gordon D. Nelson)

Collection Assistance to the Department of Budget and Fiscal Services. The division provided continuing oversight of a settlement agreement relating to unpaid “tipping fees,” resulting in the collection by the City of \$90,000 in delinquent fees during the fiscal year from a California company no longer doing business in Hawaii as a solid waste collector. (Gordon D. Nelson)

LAND USE SECTION

Hui Malama I Na Kupuna O Nei v. Wal-Mart, 122 Haw. 171 (2009), cert. rejected, 2010 WL 1973594 (2010). In this lawsuit, plaintiffs brought action against the City and the Department of Planning and Permitting (“DPP”), alleging that the City defendants failed to comply with Hawaii Revised Statutes (“HRS”) Chapter 6E and failed to seek review and comment from the State Historic Preservation division (“SHPD”) before DPP issued grading and building permit applications for the Wal-Mart Project where 42 human skeletal remains were subsequently uncovered. The First Circuit Court granted the City defendants’ motion for summary judgment, and plaintiffs appealed to Hawaii’s Intermediate Court of Appeals (“ICA”). The ICA agreed with the Circuit Court that HRS Section 6E-42 was inapplicable to the Wal-Mart Project, because at the time DPP issued the grading and building permits, there was no factual basis to know or reasonably believe that the Wal-Mart Project “may affect” a burial site. Plaintiffs again appealed, by filing an application for writ of certiorari (“Writ”) with the Hawaii Supreme Court on April 8, 2010. The division defended the City defendants throughout the litigation and specifically drafted pleadings and responses to the Writ, which served as the basis for the court’s rejection of the Writ by order dated May 17, 2010. This ruling validates DPP’s current process regarding these matters. (Don S. Kitaoka, Jesse K. Souki)

Cramer v. City and County of Honolulu et. al, Civil No. 09-00223 (SOM/KSC). The division represented the City in a lawsuit alleging that the City Department of Planning and Permitting violated plaintiff’s constitutional rights by issuing a Conditional Use Permit (“CUP”) to authorize the operation of a group living facility next to plaintiff’s home. Plaintiff argued that that the City’s approval of the CUP and minor modifications to the CUP violated his constitutional right of equal protection and constituted an illegal taking of his property. Plaintiff sought damages and injunctive relief precluding the City from issuing further permits to the group living facility. The Division filed a motion for summary judgment and the City prevailed on all counts. (Don S. Kitaoka, Kyle T.L. Chang, Brad T. Saito)

Lopez v. City and County of Honolulu, Civil No. 09-1-0529-03 (RAT). The division represented the City in a lawsuit alleging that the City Department of Planning and Permitting’s (“DPP’s”) conduct in its enforcement efforts constituted an abuse of process, unfair

and deceptive acts, an intentional infliction of emotional distress and defamation, and seeking monetary damages. As a result of complaints alleging that plaintiff was operating an illegal Transient Vacation Unit (“TVU”) rental business from his property, DPP commenced enforcement action against plaintiff which culminated in the recordation of a civil fine lien against plaintiffs’ property. Plaintiffs argued that the conduct of the City officials led him to believe that no enforcement actions would be taken.

In settlement of these claims, the City agreed to waive past fines and release the lien, in exchange for a dismissal of plaintiffs’ claims and a court order that plaintiffs will not conduct an illegal TVU on the property in the future. As a result of settlement, the City obtained a court-enforceable judgment that prohibits the use of plaintiff’s property for TVU rental operations. (Don S. Kitaoka, Kyle T.L. Chang, Brad T. Saito)

PERSONNEL/PUBLIC SAFETY SECTION

In the Matter of the Arbitration Between United Public Workers and the City and County of Honolulu, Department of Facility Maintenance. Grievant was terminated from his employment with the Department of Facility Maintenance after he was found to have misappropriated two tires from Employer City. Arbitration proceedings in the matter lasted two days and were presided over by arbitrator Ted Sakai. In the Decision and Award dated November 27, 2009, the arbitrator upheld Employer’s termination of grievant despite the Union’s allegation that grievant’s punishment of termination was disparate in comparison to other disciplinary actions taken by the City. (Elise A. Amemiya)

In the Matter of the Arbitration Between State of Hawaii Organization of Police Officers and the City and County of Honolulu, Honolulu Police Department. Grievant was terminated from his employment with the Honolulu Police Department (“HPD”) after he was found to have hid evidence from Federal Bureau of Investigation Special Agents during the execution of a search warrant at grievant’s father’s property. Arbitration proceedings lasted three days and were presided over by Arbitrator Shelley Nobriga. In the Decision and Award dated July 9, 2010, the arbitrator reinstated grievant to his former position as a Metropolitan Police Officer I without any back pay, retroactive rights and/or benefits. Although the arbitrator determined that the grievant’s actions were not sufficient to warrant termination, the arbitrator did decide that grievant’s actions did warrant substantial discipline. Accordingly, the arbitrator determined that the period of time between grievant’s discharge from HPD and his reinstatement pursuant to the Decision and Award was to be considered a disciplinary suspension (equating to nearly 2.5 years of disciplinary suspension). (Elise A. Amemiya)

TRANSPORTATION/PARKS SECTION

In the Matter of the Kapiolani Park Trust, T. No. 03-1-0018 (Trust), First Circuit Court, State of Hawaii. The division represented the Kapiolani Park Trustees in its Petition for Instructions Regarding Art Fence and Craft Fairs at Kapiolani Park filed on February 25, 2003, for the court’s instruction as to whether certain uses were permitted at Kapiolani Park pursuant to the Kapiolani Park Trust. The court ruled in the Trustees’ favor by ordering that (1) Sales of artwork at the art fence as now conducted are a permitted use of Kapiolani Park; (2) Stand-alone craft fairs as now conducted are a permitted use of Kapiolani Park; (3) Craft fairs restricted to the sales of only crafts which include a cultural aspect relevant to the purpose of the craft fair event are a permitted use of Kapiolani Park; and (4) Craft fairs at cultural festivals which offer both crafts and other cultural goods, including food and event related goods, are a permitted use of Kapiolani Park. The court issued its Order Granting Petition for Instructions Regarding Art Fence and Craft Fairs at Kapiolani Park Filed February 25, 2003, on November 23, 2009. Separate division Deputies Corporation Counsel represented the Trustees and the Department of Parks and Recreation in the proceedings. (Dawn D. M. Spurlin, Jesse K. Souki)

Rapid Transit Project, Environmental Compliance. The division counseled and advised the Rapid Transit division, Department of Transportation Services, on issues related to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”) Environmental Review Process (Public Law 109-59); National Environmental Policy Act (“NEPA”); Hawaii Environmental Policy Act (“HEPA”); National Historic Preservation Act of 1966; Hawaii Historic Preservation and Burial Laws; Section 4(f) of the Department of Transportation Act of 1966; Clean Water Act; contaminated sites; and related local, state, and federal environmental regulatory issues for the Honolulu High-Capacity Transit Corridor Project. The division supported the drafting and negotiation of required agreements between the City, consulting and commenting parties, and local, state, and federal agencies related to these regulations. The Division provided advice and counsel on mitigation strategies, compliance, and environmental issues as they relate to contract implementation. (Donna M. Woo, Jesse K. Souki)

Stop Rail Now, et al. v. De Costa, Supreme Court No. 29354, Intermediate Court of Appeals of the State of Hawaii. The division represented the City Clerk in an appeal to the Intermediate Court of Appeals (“ICA”) of the Circuit Court’s judgment in Civil No. 08-1-1605-08 (KKS), which granted plaintiffs’ motion for a preliminary injunction and ordered the Clerk to process plaintiffs’ initiative petition for a proposed ordinance regarding mass transit under Revised Charter of the City and County of Honolulu (“RCH”) Section 3-404(1) using the definition of “petition” under RCH Section 3-402(1). On appeal, plaintiffs argued that the Circuit Court erred in its interpretation of the law and that the Clerk should process the petition under RCH Section 3-404(3). The ICA affirmed the judgment of the Circuit Court, and the Hawaii Supreme Court rejected plaintiffs’ application for a writ of certiorari. (Reid M. Yamashiro, Don S. Kitaoka, Dawn D. M. Spurlin, Diane T. Kawauchi)

Communications-Pacific, Inc. v. City and County of Honolulu, et al., No. 28010, Intermediate Court of Appeals of the State of Hawaii. With the assistance of special deputy corporation counsel, the division defended the City in an appeal to the Intermediate Court of Appeals (“ICA”) of the Circuit Court’s order granting the City’s Motion to Dismiss in Civil No. 05-1-2249-12 (EEH). On appeal, plaintiff argued that the Circuit Court erred in its interpretation of the law, specifically, its interpretation of the “exclusive remedy” provision of HRS Section 103D-704 (Supp. 2008), which the Circuit Court relied upon to dismiss the lawsuit for lack of jurisdiction. The ICA affirmed the Circuit Court’s order, and the Hawaii Supreme Court rejected plaintiff’s application for a writ of certiorari. (Don S. Kitaoka, Reid M. Yamashiro)

Rapid Transit Project, Procurement Issues. The division counseled and advised the Rapid Transit division, Department of Transportation Services, on issues related to solicitations for the West Oahu/Farrington Highway Guideway Design-Build Contract, the

Maintenance and Storage Facility Design-Build Contract, the Core Systems Design-Build-Operate-Maintain Contract, the Kamehameha Highway Guideway Design-Build Contract, the Farrington Stations Design Contract, and the West Oahu Stations Design Contract. (Reid M. Yamashiro, Nicole R. Chapman, Amy R. Kondo)

Responses to Hawaii Revised Statutes ("HRS") Chapter 92F Requests. The division assisted the Department of Transportation Services in its responses to five HRS Chapter 92F information requests by the Honolulu Advertiser dated October 16, 2009, October 27, 2009, November 3, 2009, February 5, 2010, and April 6, 2010. The Honolulu Advertiser disagreed with the City's response to its October 27, 2009 request for evaluation committee meeting minutes and appealed the response to the Office of Information Practices ("OIP"). The City's position was that the evaluation committee was not a board subject to the Sunshine Law and therefore did not prepare or maintain meeting minutes. OIP agreed with the City's response and closed its file on the matter. (Reid M. Yamashiro)

Inmate Work Program Agreement. The division drafted an agreement to be used as a model agreement between the Department of Public Safety, State of Hawaii ("DPS"), and City agencies regarding the development and implementation of an Inmate Work Program that would allow supervised DPS inmates to provide labor to City agencies. The agreement established the responsibilities of each of the parties and the eligibility requirements that the inmates must meet in order to participate in the program. (Reid M. Yamashiro)

State Legislation. Our efforts in the 2010 state legislative session were directed at pursuing an exception to Senate Bill No. 466 to exclude governmental entities from the provision banning the use of leaf blowers during early morning and evening hours. Without the exception from the ban, City agencies would be unable to fiscally and effectively maintain City properties. In its final form, Senate Bill No. 466, adopted as Act 206, effective July 1, 2010, exempted government entities from the ban on the use of leaf blowers in or around residential areas during the early morning and evening hours. The division also assisted the State in seeking an amendment to Hawaii Revised Statutes Section 46-71.5 which would continue to uphold the right of county agencies to require the State to indemnify the counties when using county property or facilities, but to allow the governor to delegate her authority to agree to the indemnification to the superintendent of education. On May 27, 2010, Governor Lingle signed into law Act 145 authorizing the governor to delegate to the superintendent of education the authority to agree to indemnify the counties for use of county facilities by the Department of Education. (Dawn D. M. Spurlin)

County Legislation. The division advised and assisted the Department of Parks and Recreation ("DPR") in pursuing the adoption of legislation establishing fees for participation in after-school programs (Ordinance No. 09-27); prohibiting shopping carts in City parks (Ordinance No. 10-5); and prohibiting tents in City parks (Ordinance No. 10-4). In addition, the division assisted in the drafting and review of new administration rules and regulations promulgated by DPR establishing fees and charges and permitting procedures for use of recreational facilities at Central Oahu Regional Park, Waipio Soccer Complex, and Hans L' Orange Neighborhood Park for special events. (Dawn D. M. Spurlin)

REAL PROPERTY TAX DIVISION

The Real Property Tax ("RPT") division is comprised of two attorneys. They are assisted by two support staff.

The RPT division maximizes intake of real property assessment revenues to the City and County of Honolulu ("City") by efficiently managing cases and vigorously defending the City against real property tax appeals brought in Tax Appeal Court ("TAC"). The RPT division also defends the City in certain appeals brought before the Board of Review ("Board").

The RPT division provides legal advice and support to the Real Property Assessment division ("RPAD"), the Treasury division, and the Department of Budget and Fiscal Services ("BFS"), as necessary to supplement the Counseling and Drafting division's functions. Also, the RPT division assists the RPAD in drafting and implementing procedures and proposed legislation that will support assessments and resolve disputed legal issues.

The RPT division coordinates and works with the other counties in developing appraisal procedure and legislation, as well as litigation practices through the ongoing exchange of information and support of legal positions on common issues.

The RPT division continues to build good working relationships with the TAC Judge and court personnel, while implementing office and court procedures to streamline prompt resolution of cases. The RPT division continues to obtain information about properties through discovery in court cases to assist the RPAD and to optimize the assessment process, and uses the City's private consultant/appraiser for appraisal training and litigation support.

Statistics

During the 2009-10 fiscal year, in resolving appeals before the TAC, the RPT division recovered about \$5 million in total taxes and approximately \$2 million above the tax amounts claimed by the appellant taxpayers.

For the fiscal year, the RPT division opened 132 new appeals and received 69 assignments, had a previous workload of 205 appeals and assignments, and completed and closed 34 appeals and 17 assignments. Additionally, the RPT division received about eight to ten informal requests per week from the RPAD for advice and other assistance.

Highlights and Accomplishments

Appeals and Related Matters

Tax Appeal of GGP Ala Moana LLC, Case No. 08-0111. The RPT division was successful in reaching a stipulated dismissal of this appeal of Kona Street, alleged to be valued between \$100 and \$60,000, but assessed at \$1.7 million. The RPT division reported to RICO that the taxpayer's expert was engaged in the unlicensed practice of appraisal and delivered an assessment report that considered the value of omitted improvements and air rights plus the intrinsic value of Kona Street to the Ala Moana Shopping Center's operations, all of which hastened the end of the dispute. (Susan A. Bender)

Garry P. Smith and Earl F. Arakaki, et al., v. City and County of Honolulu, et al., No. 30049, Supreme Court of the State of Hawaii; No. 09-1256, Supreme Court of the United States of America. The TAC granted summary judgment in favor of the City, the State of Hawaii ("State"), and the counties of Kauai, Maui and Hawaii, and rejected the Plaintiffs' claim that the real property tax exemption granted to lessees of Hawaiian Homestead lands was racially discriminatory and therefore unconstitutional. Plaintiffs appealed the TAC decision to the Hawaii Intermediate Court of Appeals. The appeal was transferred to the Hawaii Supreme Court despite opposition by the State and the counties. Plaintiffs then filed a motion for injunction pending appeal, asking the Supreme Court to enjoin the counties from granting the tax exemptions until the appeal could be adjudicated. The Hawaii Supreme Court denied plaintiffs' motion for injunction upon vigorous opposition to the motion by the State and the counties.

After the submission of briefs by the plaintiffs and defendants, oral argument on the merits was held on August 5, 2010 before the Hawaii Supreme Court. The court's decision is pending.

In addition to appeals to state appellate courts, the plaintiffs also filed a Petition for Writ of Certiorari to the United States Supreme Court. The City, State and counties are contemplating their response to the Petition. (Lee M. Agsalud)

Tax Appeal of Elizabeth Dailey and Michael Dailey, Case Nos. 05-0085 and 05-0086 (Consolidated); Case Nos. 08-0006, 09-0003, 10-0022 and 10-0023. At the request of the Tax Appeal Court in February 2010, the RPT division and the appellant agreed to prepare written findings with reference to the record on the issues in the consolidated cases, which originally went to trial in 2007. At issue was the appropriateness of size adjustments made in the City's 2006 assessment of the Dailey Estate, consisting of two agricultural-zoned beachfront parcels in Mokuleia. Because the Tax Appeal Court had not rendered a decision in three years, the RPT division made a global offer of settlement, which was accepted by the taxpayers before the findings were due. (Susan A. Bender)

City Appeals From Board Decisions. For the first time, the RPT division has filed appeals to TAC on behalf of RPAD, challenging the decisions of the boards of review related to the assessments of Wal Mart and Ohana Military Communities, among others. In these cases, the RPT division will be prosecuting, rather than defending the appeals. (Lee M. Agsalud, Susan A. Bender)

Other Matters

During the fiscal year, the RPT division provided advice and assisted on a variety of other matters such as:

City and State Legislation. The RPT division opined regarding the legal ramifications of proposed tax relief legislation, monitored for legality the tax relief bills introduced in the City during 2009 and 2010, and testified at City Council hearings when necessary. The RPT division was instrumental in drafting bills creating a homeowner's class and allowing dedication for residential use in areas of mixed use zoning. During the same time period the RPT division also assisted RPAD in presenting legislation before the State of Hawaii legislature related to real property tax issues. (Lee M. Agsalud, Susan A. Bender)

2010 Statewide Board of Review Conference. The RPT division participated in, and helped plan the agenda for, the statewide annual conference of the boards of review for each county, held at the Ala Moana Hotel. This involved identifying pertinent issues and coordinating presentations with representatives of each county, as well as conducting a legal question and answer forum. (Lee M. Agsalud, Susan A. Bender)

Other Board of Review Matters. The RPT division assisted RPAD in revising Board forms and procedures, monitored hearings, and advised RPAD in the presentation of arguments to the Board. (Lee M. Agsalud, Susan A. Bender)

Tax Foreclosure Sale. The RPT division assisted, advised and prepared documentation for BFS in foreclosing on properties for which real property taxes had not been paid, and in selling those properties to enforce the City's paramount lien. (Lee M. Agsalud)

Leasing of City-Owned Real Property. The RPT division assisted and advised BFS and RPAD on issues arising from the leasing of City property to commercial tenants, and the taxation of that property, including the drafting and interpretation of lease provisions and the collection and compromise of delinquent real property taxes. (Lee M. Agsalud, Susan A. Bender)

Tax Credit Appeals. The RPT division assisted and advised the Treasury division (1) on issues arising from the denial of tax credits and (2) in drafting amendments to Article 13 to make the tax credit easier to implement. In July 2009, the RPT division obtained a dismissal in the first tax credit trial ever heard in the District Court of the First Circuit. (Lee M. Agsalud, Susan A. Bender)

LITIGATION DIVISION

The Litigation Division presently consists of nine attorneys: a division head, and eight trial attorneys. The division is supported by twelve support staff which includes a supervisor, two paralegals, four legal clerks, one senior clerk typist, and four messengers.

The Litigation Division represents the City before all of the state and federal courts in the State of Hawaii, including the two appellate Courts of the State of Hawaii, the United States District Court for the District of Hawaii, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States. The division processes and litigates all claims by or against the City¹, seeks collection of monies owed to the City, and handles Subpoenas Duces Tecum directed to the Honolulu Police Department.

In addition to tort claims, the Litigation Division handles claims relating to contracts, civil rights, employment issues and other non-tort related matters.

¹The cases specified in this subsection are not a comprehensive listing of all cases handled by the Litigation Division and are merely offered as a representative sample of the types of matters assigned to the division.

Statistics

During the 2009-2010 fiscal year, the Litigation Division handled a great number of cases against and for the City, including active lawsuits as well as pre-lawsuit claims, as set forth below:

Pending cases as of June 30, 2009:	1,807
Number of cases completed:	909
Number of cases opened:	857
Pending cases as of June 30, 2010:	1,755

Highlights and Accomplishments

Lawsuits

The division took five cases to trial and filed dispositive motions in a number of other cases. The division was successful in two trials, two trials are awaiting the Judge's decision, and in one trial, the jury found in favor of Plaintiffs. In other matters, the division successfully applied for and obtained a Writ of Mandamus from the Supreme Court of the State of Hawaii regarding the processing of Subpoena Duces Tecum matters by a Circuit Court Judge. There were eighteen dispositive motions filed and seven are awaiting their hearing dates, three were granted in part and denied in part, and eight were successful. Following is a brief summary of several of the cases successfully completed by the division in the past year:

Christopher Bartolome v. City and County of Honolulu, et al., United States District Court, District of Hawaii. This case alleged excessive force in making an arrest, where plaintiff led police officers on a high-speed chase, ultimately leading to his being caught and arrested. Plaintiff claimed that the officers used excessive force against him in capturing and arresting him. A jury trial was held on April 21, 2009, resulting in a jury in favor of the City and the individually named police officers. (D. Scott Dodd, Richard D. Lewallen)

Lisa Kobashigawa, et al. v. City and County of Honolulu, et al., First Circuit Court for the State of Hawaii. This is a death case where a pedestrian walking in a crosswalk was struck by a vehicle. Plaintiffs claim that the street lights in the area where the accident occurred were obstructed by trees and that the crosswalk was unsafe. A jury trial was held on October 7, 2009 and after ten days of trial the jury returned a verdict in favor of the City. Plaintiffs have appealed the jury's decision. (Darren M. Suzuki, Richard D. Lewallen)

Susan Siu v. City and County of Honolulu, et al., United States District Court for the District of Hawaii. Plaintiff alleged civil rights violations, harassment, whistle blower, age discrimination, and retaliation. A jury trial was held on March 23, 2010, and after approximately eight days of trial, the jury returned its verdict in favor of the City. Plaintiff has appealed the jury's decision. (Tracy S. Fukui, D. Scott Dodd, Darren M. Suzuki)

Sharon Black v. City and County of Honolulu, et al., United States District Court for the District of Hawaii. Plaintiff has been employed by the Honolulu Police Department ("HPD") as an Outreach Worker assisting the department in dealing with homeless and mentally ill persons since 1992. On August 24, 2005, HPD was notified of a complaint that Plaintiff had removed documents from the Medical Examiner's Office ("MEO") on August 4, 2005, which were confidential, and which she did not have permission to print out or remove from the MEO, and then failed to return all of the original documents she printed. The City Prosecutor made the decision to charge Plaintiff with unauthorized computer access in the second degree for having printed information from the MEO computer, along with other misdemeanor charges. The criminal trial resulted in a hung jury. The charges were later dismissed with prejudice in April 2007. The issues in this trial are: (1) whether Defendants maliciously prosecuted Plaintiff, and (2) whether Defendants retaliated against Plaintiff because she filed a previous lawsuit against the City and other individuals in 1997. A jury trial was held on October 6, 2009, and after approximately six days of trial, the jury returned its verdict in favor of the Plaintiff, awarding her \$150,000.00 in general damages. The City has appealed the jury award. The case is currently before a mediator regarding settlement. (Stephanie L. Marn, John P. Moran, D. Scott Dodd)

Kumiko Burke, et al. v. City and County of Honolulu, et al., United States District Court for the District of Hawaii. This lawsuit arises from the execution of Search Warrant 2007-160 on August 3, 2007, at the Holo Holo Pawn Shop, located at 1705 Kalakaua Avenue, Honolulu, Hawaii. Plaintiffs allege civil rights violation, wrongful search and seizure, and harassment. A non-jury trial was held on June 4, 2010 for approximately five days. There was an additional two days of trial, June 23, 2010 and July 19, 2010, because the City's expert witnesses were not available. We are awaiting the Magistrate Judge's decision. (Curtis E. Sherwood, Sharon Lam Blanchard, Kyle K. Chang)

Eric Minton, et al. v. City and County of Honolulu, et al., First Circuit Court for the State of Hawaii. Plaintiffs are members of a union that provides workers at theatrical events throughout the City and they alleged that they were "blacklisted." Plaintiffs' allege civil rights violation for improper and illegal directives, and for lost income. A non-jury trial was held on April 12, 2010 for approximately five days. We are awaiting the Judge's decision. (Richard D. Lewallen, Darren M. Suzuki)

In other matters, the division successfully applied for and obtained a Writ of Mandamus from the Supreme Court of the State of Hawai'i regarding the processing of Subpoena Duces Tecum matters by a Circuit Court Judge.

Honolulu Police Department v. Town, Supreme Court No. 30262. The division advises the Honolulu Police Department in responding to subpoenas *duces tecum* seeking police records. The division obtained a Writ of Mandamus from the Hawaii Supreme Court that directed a circuit court judge in a criminal case to quash a subpoena *duces tecum* that improperly subpoenaed police records during the discovery stage of the prosecution. The Hawaii Supreme Court held that subpoenas *duces tecum* are not tools to be used in discovery in criminal cases and that criminal defendants are required by court rule to seek discoverable materials from the prosecutor's office directly. Obed K. Kay, the Defendant in this matter, had subpoenaed police records without first asking the Department of the Prosecuting Attorney for said police records. The division filed a motion to quash Defendant Kay's subpoena *duces tecum*, which the circuit court denied. The division then petitioned for, and obtained, a Writ of Mandamus from the Hawaii Supreme Court that led to the Hawaii Supreme Court clarifying the methodology by which discovery in criminal cases is to be

conducted. As a result of this case, the number of subpoenas *duces tecum* directed to the Honolulu Police Department for police records, which used to number in the mid-hundreds, has been significantly reduced. (Kyle K. Chang)

The division successfully settled several motor vehicle accident, flooding, sewage, personal injury, and civil rights cases, in which negligence was alleged against the City.

Motor Vehicle Accident Cases: Stevie Cordeira v. City; Gil Mallari, et al. v. City; Raymond, Nishibata v. City; Allsyn Vinsh v. City

Flooding Cases: Les Kawamoto, et al. v. City

Sewer Cases: Claim of Gina Salvia

Personal Injury Cases: Claim of Julieta Lozada; Aaron Wolf v. City; Gail Baracao v. City; Cecelia Shaw v. City; Tammy Antonio v. City; Gary Miske v. City; Sylvianne Young v. City; Merrilee Rundell v. City; Jocelyn Herrington v. City

Property Damage Cases: Hawaiian Telcom v. City

Civil Rights Cases: Richard Simms v. City; Sheryl Sunia v. City; Antoinette Botelho v. City; William Coward v. City; Patrick Torres v. City

The division successfully obtained summary judgments in Vicki Bentzien v. City; Daniel Faaita v. City; Olga Wintermantel v. City; David Woodard v. City; Larry Ikei v. City; and Willie Singleton v. City. The division successfully obtained summary judgments, granted in part and denied in part in Un Chu Chong v. City; Victor Matubang v. City; Kumiko Burke, et al. v. City, et al.

The division was also successful in obtaining dismissal of the complaint filed in Rhonda Mandawoub v. City, a case in which personal injuries were caused when Plaintiff's foot caught in the chain link fence as she climbed over it; and James Cone v. City, an alleged civil rights violation.

The City was successful in two cases in the Hawaii appellate courts. In Vicki Bentzien v. City, the Intermediate Court of Appeals dismissed the appeal. In Ali Jabali v. City, the Intermediate Court of Appeals dismissed the appeal.

The division is currently defending the City in several high profile motor vehicle cases (Olga Sabado, et al. v. City; Phi Nguyen, et al. v. City; Tanya Makinney, et al. v. City; Levina Hoohuli, et al. v. City; Brian Mullen, et al. v. City; Peggy Ruleford v. City); several flood cases (Paul Hieda, et al. v. City; Oliver Lee, et al. v. City; Mr. Sandman, et al. v. City; Brian Groelsma, et al. v. City); a sewer case (Randolph Neal, et al. v. City); and a personal injury negligence claim (Susan Perron, et al. v. City).

State Legislation

The Litigation Division also continued with its advocacy of legislation favorable to the City by providing input regarding proposed bills relating to tort reform, governmental immunity, and governmental tort claim procedures.

HONOLULU ETHICS COMMISSION*

Charles W. Totto, Executive Director and Legal Counsel

Mission

The purpose of the Ethics Commission (Commission) is to ensure that City officers and employees understand and follow the standards of conduct governing their work for the public. The Commission's main focus is on conflicts of interest and the misuse of government resources or positions. The Commission implements its objectives through a balance of training programs, advisory opinions, enforcement actions and legislation.

To find out more about the Commission and its activities, visit the Commission's web site at www.honolulu.gov/ethics. The web site has information about the Commission's meetings, procedures, the standards of conduct, and useful ethics guidelines of interest to the public, and City employees and officers.

Resources

The seven Commission members are appointed by the mayor and confirmed by the City Council. Commissioners serve staggered five-year terms. The members in FY 2010 were:

	<u>Term Expiration</u>
Lex R. Smith, Esq., Chair.....	December 31, 2011
Susan H. Heitzman, Vice Chair.....	December 31, 2010
Matthew H. Kobayashi.....	December 31, 2009
Wayne T. Hikida.....	December 31, 2009
Patricia Y. Lee, Esq.	December 31, 2010
Geri Marullo.....	December 31, 2011

The Commission was staffed with an executive director/legal counsel and a legal clerk. The Commission's budget for FY 2010 was \$199,621.

*The Ethics Commission is attached to the Department of the Corporation Counsel for administrative purposes only.

Ethics Training

The Commission staff continued the mandatory ethics training program for all elected officials, managers, supervisors and board and Commission members. Honolulu's mandatory ethics training and retraining program is one of the most ambitious in the United States. In FY 2010, the Commission trained 450 City officials, bringing the total to over 4,900 public servants trained since the law was enacted. In addition, the Commission staff presented its "Ethics Checklist" orientation training to 309 new City officers and employees. As a result, all of the current City officials and more than half of the City's workforce have received some form of ethics training.

Last year, the Commission introduced a mandatory ethics refresher course for all elected officials, supervisors, managers and board and Commission members. This year 206 attended, bringing the total receiving retraining to 1,218.

Some agencies take advantage of the training beyond those who are mandated to attend. For example, all Mayor's Office and Council staff, emergency medical services personnel, City attorneys and fire department recruits also attend ethics training.

Training programs continue to greatly reduce the number of unintentional ethics violations. In addition, these programs should increase public confidence in City employees and officers.

Advice and Enforcement

In the past fiscal year, the Commission received 237 requests for advice from City personnel. By the end of FY 2010, the Commission had responded to all but four of these requests. Also in FY 2010, the Commission began investigating 91 complaints of unethical conduct by City personnel, and 48 of these complaints were outstanding at fiscal year end. In FY 2010 The number of complaints warranting investigation increased by 49% over the number of complaints investigated in FY 2009. Increasing complaints reflect that the public and City workers will report misconduct and believe that the Commission offers a fair and effective forum to examine and resolve their concerns. In part because of the continued increase in complaints investigated, the Commission will be adding another full-time attorney position in FY 2011.

The Commission also received and reviewed 571 financial disclosure statements from high-level City officials.

The Commission rendered formal advisory opinions in the following cases:

- The Commission found that a City employee who testifies as part of her regular City employment duties may not retain a witness fee because of the prohibition against dual compensation in Section 11-102(d) Revised Charter of Honolulu (RCH). Advisory Opinion No.2009-5
- The Commission opined that the City administration did not violate the ethics law prohibiting the use of city resources for political purposes when it circulated a taxpayer-funded brochure on rail transit in the city's newspapers just prior to the November 2008 election, which included a ballot measure on rail transit. The brochure did not violate the ethics laws because the mayor has the implied power to spend public funds to inform and educate the public about matters of public concern, including matters that are subject to a vote, and because the brochure did not constitute partisan advocacy by expressly or implicitly urging the voters to cast their ballots a particular way. Advisory Opinion No. 2009-6
- The Commission clarified that the ethics laws do not automatically bar city attorneys from providing pro bono legal services to the community. City attorneys providing pro bono legal services, however, must comply with the City's standards of conduct. Advisory Opinion No. 2010-1
- The Commission found that Councilmember Rod Tam misused City resources contrary to RCH Section 11-104 for his personal benefit by charging the City for meals in circumstances where (1) he paid less for the meal than the amount he charged the city; (2) his justification for the meal was false; (3) the meal was not directly related to his councilmember duties; (4) the meal was with his personal business associates; or (5) the meal was with his family members. In addition, during the investigation the Commission discovered that over a 9-year period the councilmember failed to disclose significant financial information, as required by ROH Sec. 3-8.4, regarding businesses and nonprofits in which he was an officer or director. Advisory Opinion No. 2010-2
- The Commission determined that for purposes of the City's gift prohibition laws, the value of a ticket to a political fundraiser event that is given to a City officer or employee by someone who has an interest that could be affected by the officer or employee is equal to the fair market value of the benefits the City officer or employee receives by attending the fund raiser (e.g., the dinner provided, the golf green fees, door prizes). Advisory Opinion No. 2010-3

Legislation

The Commission created and endorsed a Charter amendment to prohibit councilmembers from participating in or voting on a bill or resolution where the councilmember has a conflict of interest. Also, the Commission supported a Charter amendment to create a law that would prohibit a city department head from acting where the head had a conflict of interest arising out his/her employment before coming to the City.

Along with the ethics boards of the other counties, the Commission supported the introduction of bills at the legislature to clarify that state law does not prohibit ethics agencies from imposing civil fines on City officials. These bills failed without discussion, but will be advanced again in the 2011 legislative session.